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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-918

EVE PELL, BETTY SEGAL AND PAUL JACOBS,

Appellants

v.

RAYMOND K. PROCUNIER, DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF HOUSTON CHRONICLE PUBLISHING COMPANY, AMICUS CURIAE

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OPINION BELOW

The Opinion of the three judge District Court is reported at 364 F. Supp. 196 (1973).

INTEREST OF THE AMICUS CURIAE HOUSTON CHRONICLE PUBLISHING COMPANY

The Houston Chronicle Publishing Company ("Chronicle") operates a daily newspaper of general circulation

printed in Houston, Texas and circulated throughout the City of Houston, the Southwest and the nation. Chronicle reporters investigate news of public interest and concern for publication in the Chronicle. The principal, and in many cases, the only effective means of gathering news of satisfactory reliability and comprehensiveness is through the means of face-to-face interviews by reporters with persons who have personal knowledge of the matters in question. During late 1972 Chronicle reporters were denied access to Federal prisoners held in custody in county jails in Harris and Galveston counties, Texas. The Chronicle filed suit for declaratory and injunctive relief and on August 24, 1973 the District Court granted such relief holding the rules, regulations and procedures which prevented face-to-face interviews between Chronicle reporters and consenting prisoners to be violative of First Amendment rights of prisoners, the press and the public. *Houston Chronicle Publishing Company* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973). A copy of the Memorandum and Order entered by the District Court in the *Chronicle* suit is attached as Appendix "B" to the jurisdictional statement of Appellants on file in this case.

The Federal Defendants in the *Chronicle* case filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit but on January 2, 1974 filed a Motion to Dismiss their appeal pursuant to Rule 42(b), Federal Rules of Appellate Procedure. On January 11, 1974 the Court of Appeals for the Fifth Circuit entered its Order dismissing Federal Appellants' appeal. The State Defendants in the *Chronicle* case did not perfect their appeal to the Court of Appeals for the Fifth Circuit.

As a member of the group certain to be directly affected by any decision of this Court in the instant case and as a

prior party to litigation establishing and protecting rights sought to be protected by the Appellants in the instant case, the Chronicle has a vital interest in assisting the Court to focus upon the important issues raised in this appeal.

QUESTION PRESENTED

Whether Section 415.071 of the California Department of Corrections Manual constitutes an impermissible abridgment of the rights of the press under the First Amendment to the United States Constitution.

REGULATION INVOLVED

Section 415.071 of the California Department of Corrections Manual which provided as of the dates involved in this case as follows:

> "Press and other media interviews with specific individual inmates will not be permitted."

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution commands that freedom of the press be given the broadest scope that can be countenanced in an orderly society. *Bridges* v. *California,* 314 U.S. 252, 86 L.Ed. 192 (1941). First Amendment freedoms necessarily carry with them the right to engage in all activities fundamental to their fullest realization, including the right to receive and distribute information as well as the right to speak or print. *Griswold* v. *Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). Government denial of press access to consenting newsworthy sources of information constitutes

an indirect means of limiting the information which the press might publish and the public may receive. Indirect means of stifling First Amendment freedoms by Government are as constitutionally invalid as more heavy handed frontal attacks on such freedoms. *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960).

The District Court in the instant case specifically found that there was no overriding or compelling state interest which would justify infringement of First Amendment freedoms of the affected prisoners. *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D.Cal. 1973). That finding constitutes an implicit finding that there is no legitimate governmental interest sufficient to justify abridgment of any First Amendment rights which may be possessed by the press. Where there is no substantial and overriding valid governmental purpose which justifies infringement of protected freedoms, governmental activities having that effect are constitutionally invalid. *Griswold* v. *Connecticut*, 381 U.S. 479 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). This Court has previously stated that news gathering is not without First Amendment protection and that governmental activities which disrupt reporters' relationships with their news sources and have insufficient governmental purpose would have no justification. *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972) at 408 U.S. 707-708. That reasoning requires a holding that complete denial of interviews requested with consenting inmates is constitutionally invalid.

The District Court's holding that the press has no First Amendment right to seek out and obtain interviews with consenting prisoners dilutes and largely makes ineffectual its other holding which was that prisoners have a First Amendment right to request and be interviewed by representatives of the press. It is a fundamental concept that where certain basic First Amendment rights are concerned,

the maximum encouragement and development of those rights are to be protected. *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). The broad principle stated in *NAACP* v. *Button, supra,* is not satisfied by a holding which would tend in practice to inhibit recognized First Amendment rights of prisoners to speak and be heard, since, as pointed out in Appellants' jurisdictional statement, many inmates possessing meaningful and relevant information who would consent to be interviewed would hesitate to take the extra step and actively seek out reporters for purposes of giving interviews.

The District Court's finding that there was no justifiable state interest to prevent prisoners who wanted to be interviewed by the press from giving such interviews is wholly inconsistent with its adherence to and application of the holding in *Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F.2d 1062 (9th Cir. 1973) which was founded on a different factual basis. Moreover, the District Court's holding as regards First Amendment rights of the press is based upon a misreading of *Washington Post Co.* v. *Kleindienst,* 357 F.Supp. 770 (D.D.C. 1972) remanded which directions at 477 F.2d 1168 (D.C.Cir. 1972) opinion on remand 357 F.Supp. 779 (D.D.C. 1972) affirmed in *Washington Post Co.* v. *Kleindienst,* No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974). Finally, the District Court's holding, considering the facts upon which such holding is based, is inconsistent with the reasoning and holding of the vast majority of other courts in cases based upon similar facts. *Washington Post Co.* v. *Kleindienst, supra; Houston Chronicle Publishing Co.* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973); *Globe Newspaper Co.* v. *Bork,* Civil Action No. 73-3748-G in the United States District Court for the District of Massachusetts (February 12, 1974); *McMillan* v. *Carlson,* Civil Action No. 72-2551-M, United States District Court,

District of Massachusetts (December 31, 1973); *Burnham* v. *Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972); *c.f. Yarish* v. *Nelson,* 27 Cal.App.3d 893, 104 Cal.Rptr. 205 (Ct.App.1st Dist. 1972); *contra Mitford* v. *Pickett,* 363 F.Supp. 975 (E.D.Ill. 1973).

ARGUMENT

I.

State Denial of Press Access to All Prisoners Who Consent to Personal Interviews is Prohibited by The First Amendment to the United States Constitution.

The state regulation herein attacked absolutely prohibits all but random press interviews of inmates in California penal institutions. *Hillery* v. *Procunier,* 364 F.Supp. 196 (N.D.Cal. 1973) at 199. The regulation has that effect even in instances where an inmate affirmatively consents to an interview requested by the press. *Hillery* v. *Procunier, supra,* at 197.

The regulation in question is not restricted to interviews with inmates who might be troublemakers, to institutions at which there are serious security problems, or to interviews which present severe and meaningful administrative problems for the institution in question. Moreover, the findings of the District Court provide no support for the proposition that the regulation in question has a meaningful effect in reducing administrative burdens, in enhancing the security of the state's penal institutions, in advancing rehabilitation or in preventing notoriety for prison celebrities or "big wheels".

In light of these facts and the failure of the District Court to find that the regulation is justified on the basis of compelling and overriding legitimate governmental interest,

it must be concluded that the regulation herein attacked sharply and clearly poses the question whether the press possesses any First Amendment right to gain access to consenting prison inmates for purposes of conducting news gathering interviews.

Although the District Court dismissed First Amendment claims of the press on grounds that such claims were based upon an alleged right for "special news-gathering privileges", 364 F.Supp. 196 at 199, the First Amendment question raised by the press cannot be disposed of so easily. The District Court's holding in this regard was based, first, upon a misunderstanding of the United States Bureau of Prison regulation declared unconstitutional in *Washington Post* v. *Kleindienst,* 357 F.Supp. 770 (D.D.C. 1972) and, second, upon a failure to recognize that the press was seeking only the same degree of access to prison inmates already possessed by many members of the public.

The District Court attempted to distinguish *Washington Post* on grounds that the Bureau of Prison regulations attacked therein prevented all press access to prisoners as distinguished from the California regulation in question which permitted random press access to prisoners. Such a distinction will not bear scrutiny, for the Bureau of Prison regulation brought in question in *Washington Post,* Policy Statement 1220.1A, dated 2-11-72, provides in part as follows:

> "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. *However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to discussion of institutional facilities, programs and activities.*" [emphasis added]

The court deciding *Washington Post Co.* recognized that random conversations with individual inmates were allowed under the Bureau regulations in question. 357 F. Supp. 770, at 773.

The holding that the press is seeking special access to sources not available to other segments of the public is not justified on the facts found by the court in the instant case, for the District Court noted that hundreds of private citizens visit inmates in California penal institutions every day and as many as 10,000 persons visit San Quentin every year for a large variety of reasons. 364 F.Supp. 196 at 203.

The California regulation in question denies to the press and other media an access to California inmates which is available to many other members of the public. Such denial appears on the face of the regulation to be based solely upon the purposes of the profession in which newsmen are engaged. Selective exclusion from forums open to some members of the public where based upon content alone are impermissible under the First Amendment. *Police Department* v. *Mosley,* 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

The right of the press to gain access to prisoners which is at least equal to access given other members of the general public is supported by reasoning found in *Houston Chronicle Publishing Co.* v. *Kleindienst,* 364 F.Supp. 719 (S.D.Tex. 1973) where the Court stated that:

> "It goes without saying that the general public is not allowed into jails; the security problems are obvious. But that fact does not compel the conclusion that the press should be categorically excluded from the jail, for the simple reason that certain members of the general public, to wit, friends, family, and attorneys, are for good reason allowed into jails for the purpose

> of seeing the inmates face-to-face. In the absence of a compelling State reason why the press should be excluded, the first amendment is good enough reason to allow the press into jails." at 364 F.Supp. 725.

The issue is not whether the press is seeking special access to information not otherwise available to members of the public, for it is clear from the opinion of the District Court that members of the public do have frequent and wide ranging access to inmates in California penal institutions. The true question is whether California may by regulation prohibit *all* interviews specifically requested by members of the press with consenting inmates.

By prohibiting interviews requested by the press with consenting inmates, the regulation in question operates to prevent the press from obtaining information which such interviews would have furnished. Information thereby made unavailable to the press obviously cannot be printed and published by it and is consequently unavailable to the public. The regulation in question constitutes, therefore, a complete system of prior restraint of expression. Any system of prior restraint of expression is subject to a heavy presumption against its constitutional validity. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631 (1963) at 372 U.S. 70. The complete and total ban on interviews of specific consenting inmates by the press contained in the regulation in question goes far beyond the narrow and specific limitations on the right to receive information and ideas found justifiable in *Kleindienst* v. *Mandel,* 408 U.S. 753, 33 L.E.2d 683, 92 S.Ct. 2576 (1972) and *Zemel* v. *Rusk,* 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271, reh den, 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 17 (1965) which were justified by overriding and legitimate governmental interest. As noted above, the Court in the instant case did not find such overriding legitimate governmental interest to be

present and the regulation in question is clearly not limited to those situations in which such compelling and overriding governmental interest might be present.

The purpose of allowing access to information, generally, and press access to news sources, specifically, is because discussion and dissemination of information from diverse and antagonistic sources is essential to the welfare of the public in a free society. *Associated Press* v. *United States*, 326 U.S. 1 (1945). This Court has long recognized the importance of the first of these two components of the First Amendment sought to be protected herein, i.e., the right to receive information. *Stanley* v. *Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969); *Martin* v. *City of Struthers*, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943).

The right restrained and prohibited by the regulation in question is clearly that of receiving information rather than some activity to which the receipt of information is only incidental. See *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271, reh den, 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 17 (1965). Moreover, the First Amendment right to receive information is abridged in this instance solely by a governmental regulatory interest rather than a plenary governmental power such as found in *Kleindienst* v. *Mandel*, 408 U.S. 753, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972).

The right to receive information to be obtained from inmates in penal institutions is not a right exclusive to the press, of course. It is expected that the press will publish such information so that it will ultimately be received by the public which has a vital interest in the administration of prisons. That right of the public has been recognized even in cases in which press access to consenting prisoners has been denied. In *Seattle-Tacoma Newspaper Guild* v. *Parker*, 480 F.2d 1062 (9th Cir. 1973), the Court stated the interest of the public as follows:

> "Federal prisons are public institutions, and their administration is a matter of concern to all citizens. Decisions recognizing 'the paramount public interest in a free flow of information to the people concerning public officials, their servants', are equally applicable in the realm of prison administration. The importance of the media in providing public information about the conduct of these institutions is undisputed. Indeed, it has often been through the zealous efforts of the news media that failures in a particular institution have been exposed." at 480 F.2d 1066.

In affirming the right of the press to gain access to prison inmates for purposes of conducting interviews, the Court in *Burnham* v. *Oswald,* 342 F.Supp. 880 (W.D.N.Y. 1972) justified its holding as follows:

> "Prison inmates live out of the public's sight and hearing. Opportunity for shoddy treatment and bureaucratic abuse exists. Access by the news media to the inside of prisons is the most effective way to give meaning to the rule that an inmate has the right to communicate and to the rule that the public has a right to know what goes on within prison walls. News interviews can expose failures and abuses in particular institutions and the public attention which results can lead to corrective measures and reform." at 342 F.Supp. 886.

The second component of the right sought to be protected by Appellants herein, i.e., the right of the press to First Amendment protection for its news gathering activities, has previously been recognized explicitly by this Court. In *Branzburg* v. *Hayes,* 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 the Court stated that:

> "We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for

> First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated." at 408 U.S. 681.

Throughout *Branzburg, supra,* this Court continually stressed the importance of protection of news gathering as a First Amendment right.

> "Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purpose of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." at 408 U.S. 707.

This Court has on numerous occasions recognized that protection of specified First Amendment rights requires protection of all activities incidental thereto. *Griswold* v. *Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); *Talley* v. *California,* 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960); *NAACP* v. *Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S. Ct. 1163 (1958).

It is patently obvious that without protection for its news gathering activities the press cannot fulfill the role it must perform to satisfy the purposes for which the First Amendment was enacted. Freedom to print and publish without a corresponding right to aggressively seek out news to be so printed and published would indeed be a hollow and meaningless concept. A press which is not free to send its reporters into places or to news sources which are not legally privileged from disclosure of information would clearly fail to perform a useful function in a free society. This is particularly true when the news

sources or the place in which news sources are located pertain to or relate to governmental activities. Mr. Justice Black very eloquently stated the intended relationship between government and the press in his concurring opinion in *New York Times Co.* v. *United States*, 403, U.S. 713, 29 L.Ed.2d 822, 91 S.Ct. 2140 (1971) when he stated:

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of Government and inform the people." at 403 U.S. 717.

Prison administration is one of those areas of governmental activity which is particularly important for public examination and scrutiny. One of the principal sources of information about prisons would obviously be the inmate population of prisons who have a peculiar knowledge of the impact of prison policies and procedures upon those persons for whom they are intended. This principal has been recognized by lower courts which have recognized the interest of the public under the First Amendment in a free circulation of information about prison conditions and policies. *Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Globe Newspaper Co.* v. *Bork*, Civil Action No. 73-3748-G in the United States District Court for the District of Massachusetts (February 12, 1974); *Washington Post Co.* v. *Kleindienst*, 357 F.Supp. 770 (D.D.C. 1972) affirmed in *Washington Post Co.* v. *Kleindienst*, No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974); *Burnham* v. *Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).

The alternative means of news gathering from prisoners in California penal institutions provided by correspondence or random interviews conducted in the course of prison visits by reporters are not adequate to satisfy the protection of the rights of the press and the public contained in the First Amendment. The District Court noted in the instant case that only face-to-face interviews can accomplish the objectives of obtaining information from inarticulate inmates and of verifying the stories of inmates. *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D. Cal. 1973) at 364 F.Supp. 201. This Court itself has recognized the importance of the sustained face-to-face interview as an information gathering device. *Kleindienst* v. *Mandel*, 408 U.S. 753, 33 L.Ed.2d. 683, 92 S.Ct. 2576 (1972) at 33 L.Ed.2d 693. The United States Court of Appeals for the District of Columbia in *Washington Post Co.* v. *Kleindienst, supra*, explained in some detail why random interviews and correspondence are not satisfactory alternatives to private face-to-face interviews for news gathering purposes:

> "The evidence disclosed a number of characteristics common to news reporting in general, as well as certain factors unique to the prison setting, that make personal interviews particularly critical to accurate reporting in that context. In general, the testimony indicated that responsible journalists are reluctant to publish a story without first speaking personally to the source of the information in order to assess its credibility and reliability. Even when the story will not be attributed to the person from whom it came, journalists consider this form of verification an essential element of responsible reporting.
>
> The general importance of personal inquiry in order to check a news story is heightened in the context of prison institutions. The percentage of functional illiterates in the inmate population tends to be high. This minimizes the effectiveness of the mail services as a

vehicle for news gathering. Many of the inmates simply cannot communicate by that medium; some of the others who try are only able to read press inquiries and compose responses with the assistance of the more educated inmates. The literacy problem aside, communication by mail lacks the spontaneity and flexibility of a personal interview, and denies the reporter the ability to follow a thought. A personal interview gives feel and depth perspective.

Nor does the Bureau's policy of permitting press tours and conversations incidental thereto appear to plug the information gaps produced by the prohibition of press interviews. Conversations initiated pursuant to press tours are of necessity random and sporadic in nature, and are considerably more limited in time and permissible scope of discussion. Moreover, the tour conversations often occur with groups rather than with individual inmates. This both inhibits the newsman's ability to make a careful assessment of the credibility of individual inmates and imposes significant peer group pressures on inmates to inflate or adapt their stories to correspond to the perceived desires of their fellow prisoners."

(Slip opinion dated February 21, 1974, pp. 11-12)

Other courts have come to similar conclusions regarding the importance of face-to-face interviews as a necessary news gathering device in a prison context. *Houston Chronicle Publishing Co.* v. *Kleindienst*, 364 F.Supp. 719 (S.D.Tex. 1973); *McMillan* v. *Carlson*, Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts (December 31, 1973); *Burnham* v. *Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).

The importance of a face-to-face interview as a necessary element of news gathering has been clearly established in the instant case and by reasoning of other cases dealing with exactly the same question. The burden imposed upon

news gathering by prohibition of face-to-face interviews, therefore, is not the uncertain and questionable limitation upon news gathering found by this Court in *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 wherein the Court stated that:

> "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury . . . the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen." at 408 U.S. 693.

Where all interviews between reporters requesting such interviews and consenting inmates are prohibited, the restriction on news gathering is manifest. There is no speculation required to determine that the entirety of information which would have been furnished by private face-to-face interviews is thereby eliminated. The fact finding of the District Court below, the reasoning of other courts dealing with the same question and general knowledge of the public regarding the importance of the face-to-face interview as an information gathering source all combine to make it clear that the regulation in question does constitute a severe and meaningful restriction on the news gathering activities of the press and therefore operates to reduce or eliminate information which the public would otherwise receive.

The California regulation in question absolutely prohibits all interviews by the press with specified consenting pris-

oners. The regulation makes no exceptions for the nature of the prisoner, the nature of the institution, prevailing conditions in the institution, administrative burdens or other matters which might relate to the difficulty, safety or convenience of allowing interviews to be conducted. The regulation is indistinguishable from regulations of the United States Bureau of Prisons found unconstitutional in such cases as *Washington Post Co.* v. *Kleindienst, supra, Houston Chronicle Publishing Co.* v. *Kleindienst, supra, McMillan* v. *Carlson, supra, and Globe Newspaper Co.* v. *Bork, supra.* The right of the press and the public to receive information and the right of the press to protection for its news gathering activities have been recognized as a right protected by the First Amendment to the United States Constitution, *Branzburg* v. *Hayes, supra.* The regulation constitutes a prior restraint on expression and there is no finding by the Court below which would justify such prior restraint of expression. The face-to-face interview is a vital, important and in many instances the only effective means of news gathering. There is no meaningful alternative in a prison context to face-to-face interviews. The regulation, therefore, severely and meaningfully abridges news gathering activities of the press and impinges on the First Amendment rights of both the press and the public. Accordingly, the California regulation which denies press access to all prisoners who consent to personal interviews is prohibited by the First Amendment to the United States Constitution.

II.

Absent an Overriding and Compelling State Interest, Denial of Press Access to Prisoners for Personal Interviews Constitutes Denial of First Amendment Rights of the Press.

The District Court recognized that where First Amend-

ment rights are concerned, the State must be able to show a compelling interest in support of any regulations impinging on such rights.

> "It is a fundamental precept of constitutional law that when a state restricts a First Amendment right, especially when that restriction, is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation." *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D.Cal. 1973) at 364 F.Supp. 201.

This statement of the Court below was by no means a novel expression of the concept that only a compelling state interest will justify infringement upon First Amendment freedoms. This Court has frequently and consistently held that only vital governmental interests can justify infringement of First Amendment freedoms and that any governmental infringement upon First Amendment freedoms will be carefully scrutinized to determine if it is in fact supportive of vital governmental interests and is as narrowly and precisely drawn as is possible. In *United States* v. *Robel*, 389 U.S. 258, 19 L.Ed.2d 508, 88 S.Ct. 419 (1967), the Court declared an act of Congress unconstitutional on grounds that it constituted an overbroad limitation upon the exercise of First Amendment freedoms, even though the statute was intended to accomplish a justifiable governmental end, i.e., national security. The vice of the statute in question in the *Robel* case was that it prohibited exercise of First Amendment freedoms where the government had no legitimate interest.

> "That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made

> irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of §5(a)(1)(D) may occupy a nonsensitive position in a defense facility. Thus, §5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment right." at 389 U.S. 265-266.

The term "overbreadth" is frequently used by courts when describing the operation of government regulations which impinge upon First Amendment freedoms without adequate justification of compelling state interests. *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405. 83 S.Ct. 328 (1963) at 371 U.S. 433. The vice of overbreadth where First Amendment freedoms are concerned is to inhibit as well as absolutely prevent exercise of protected freedoms. *Muller* v. *Conlisk*, 429 F.2d 901 (7th Cir. 1970). Only a compelling state interest in prohibiting all proscribed behavior will justify government regulations impinging on First Amendment freedom. *Police Department* v. *Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960) at 361 U.S. 524.

Governmental regulations restricting or threatening to restrict the exercise of First Amendment freedoms cannot be justified merely because such regulations may be part of the exercise of other legitimate powers. Such regulations

must themselves be reasonably related to the governmental purpose which is an overriding compelling interest. *Bates* v. *Little Rock, supra.*

When speaking of the rights of prisoners to be interviewed by the press, the Court below recognized these concepts.

> "Defendants cite *Carothers* v. *Follette*, 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both 'reasonably . . . and necessarily . . . to the advencement of some justifiable purpose of imprisonment.' 314 F.Supp. 1024. The court believes that this rule is not only consistent with the 'compelling interest' test, it is concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect limitation must be related — 'reasonably and necessarily' — to the end sought." *Hillery* v. *Procunier*, 364 F.Supp. 196 (N.D. Cal. 1973) at 364 F.Supp 201-202.

Despite its recognition that the state must show both a compelling interest in limiting First Amendment rights and must demonstrate that the method it chooses to effect that limitation is necessarily and reasonably related to the end sought, the Court below failed to apply that standard in its consideration of the asserted First Amendment rights of the press. As noted above, the Court below did not find that prohibiting all press and media interviews with specific prisoners furthered the attainment of any legitimate state interest in the administration of its penal institutions, such as reducing administrative burdens, enhancing security, furthering rehabilitation, limiting notoriety accorded to prison celebrities or "big wheels" or any other legitimate government interest. In fact, the Court specifically found that Defendants failed to show that any of such interests were furthered by the regulation in question.

"And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at the hearing that 'hundreds' of private citizens visit the California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past; and they have conspicuously failed to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

Prison security is patently a legitimate concern of the defendants, but §415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it." 364 F.Supp. 196 at 203.

The Court also distinguished *Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F.2d 1062 (9th Cir. 1973) on grounds that the *Seattle-Tacoma* prison officials had made a considerable study of the interview practice and that the regulation was upheld only for McNeil Island Penitentiary, a maximum security institution for prisoners who presented serious disciplinary and security problems whereas the California regulation in question was applied statewide to all California penal institutions. The Court also distinguished *Seale* v. *Manson,* 326 F.Supp. 1375 (D.Conn. 1971) on grounds that the regulation attacked in *Seale* was one which limited rather than totally excluded interviews and on further grounds that the Plaintiff in the *Seale* case did not disclaim his reputation as a "wheel" whereas in the instant case the information officer for the Department

of Corrections testified that he was at the present time unable to name a single celebrity throughout the entire California correctional system.

The findings of the Court below lead inescapably to the conclusion that there are no overriding and compelling state interests which would justify the total prohibition on interviews of specific consenting inmates when requested by the press. The Court rejected as distinguishable the holdings in other cases which had upheld limitations upon interviews of prisoners in penal institutions. The concurring opinion of Circuit Judge Hamlin which applied the "rational basis" analysis to determine whether the regulation in question would be a justifiable infringement upon First Amendment freedom of prisoners similarly found that the record in the instant case had insufficient evidence to justify the complete ban imposed upon interviews.

Accordingly, since news gathering is a protected First Amendment freedom and since the Court below has failed to find sufficient state interest in infringing upon that freedom and has, in fact, found that there is no justifiable state interest in infringing upon First Amendment freedoms by means of complete ban on press interviews of consenting prisoners, the California regulation in question should be declared unconstitutional by this Court.

III.

The First Amendment Rights of Prisoners to be Interviewed Cannot be Adequately Realized Unless the First Amendment Right of the Press to Seek and Obtain Interviews from Consenting Prisoners is Adequately Protected.

The Court below upheld the contentions of the inmate prisoners that §415.071 of the California Department of Corrections Manual unconstitutionally infringed upon First

Amendment rights of prisoners. The Court, further, ordered that Defendants permit the specific interviews sought by the Plaintiff prisoners at the earliest practicable time under reasonable conditions and supervision. At the same time, the Court dismissed the complaint of the media Plaintiffs for failure to state a claim upon which relief can be granted.

The holding of the District Court can be read to permit interviews between members of the press and prisoners only when such interviews were initially requested by the prisoners. Although other readings of the opinion of the Court are possible, and certainly preferable, it will be assumed for purposes of this section that the holding has that effect. Thus we are left with the anomalous situation whereby prisoners who might be aware of the holding of the District Court or who might for personal reasons desire to have interviews are free to request such interviews and be interviewed, but where the press cannot actively seek out and obtain interviews of consenting prisoners. State prison authorities apparently would be free to disregard requests of the press for interviews with specific inmates and would, presumably, have no obligation to pass such requests on to the inmates in question.

Such a situation, apart from its obvious abridgment of the First Amendment rights of the press, as stated above, fails to adequately vindicate the First Amendment freedom of prisoners. First, it is a widely known fact that many prisoners are either illiterate or semi-literate at best. Many prisoners, therefore, will be wholly unaware of their First Amendment right to seek out the press and be interviewed, whether by mail or verbal request. Further, such inmates

will in all likelihood have little or no knowledge of the press or other media and would have, therefore, no idea which representatives of the media should be contacted to allow the prisoner his maximum exercise of the recognized First Amendment right. Second, many inmates although willing to consent to personal interviews and therefore contribute to the flow of information, would not be so strongly motivated as to actively seek out the press. See *e.g. McMillan* v. *Carlson,* Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts (December 31, 1973).

The illiteracy or functional illiteracy of the inmate population in penal institutions tends to be high. See *Washington Post Co.* v. *Kleindienst,* No. 72-1362 in the United States Court of Appeals for the District of Columbia Circuit (February 21, 1974), Page 11 of the slip opinion of the Court. Consequently, prisoners will not know the names of many publications, much less the reporters for those publications. Semi-literate or functionally illiterate prisoners will not be able to correspond in writing effectively so as to communicate with those members of the press or other media who might have an interest in interviewing the prisoner in question. Further, a prisoner who is unaware of his legal right to be interviewed would never reach such a hurdle in the first place.

Unless prison authorities undertake continuing programs to educate prisoners of the existence of the First Amendment right in question, a highly unlikely and improbable expectation, prisoners' exercise of the First Amendment right sought to be protected by the Court below will not be given that broad scope approved by this Court in *Bridges* v. *California,* 314 U.S. 252, 86 L.Ed. 192 (1941). Moreover, while not casting any aspersions upon any par-

ticular prison administrators, it is true, as recognized in *Burnham* v. *Oswald*, 342 F. Supp 880 (W.D.N.Y. 1972) that:

> "There have been too many instances in the past when interviews were denied simply because they were inconvenient. Prison inmates live out of the public's sight and hearing. Opportunity for shoddy treatment and bureaucratic abuse exists. Access by the news media to the inside of prisons is the most effective way to give meaning to the rule that an inmate has the right to communicate and to the rule that the public has a right to know what goes on within prison walls. News interviews can expose failures and abuses in particular institutions and the public attention which results can lead to corrective measures and reform." 342 F.Supp. at 886.

Only by allowing the press to initiate interviews can the difficulties that prisoners might otherwise have in exercising their First Amendment rights be eliminated or minimized.

In some instances, an inmate will have information which would be of great interest to the public and which the inmate would be willing to divulge in an interview with a reporter or researcher but which would not be of such nature as to prompt the inmate to actively seek out a reporter. An example of that type situation is found in *McMillan* v. *Carlson*, Civil Action No. 72-2551-M in the United States District Court for the District of Massachusetts. The Plaintiff in that case sought to interview John Larry Ray, an inmate at the United States Penitentiary at Levenworth, Kansas for purposes of obtaining information to be included in the biography of the inmate's brother, James Earl Ray, the convicted killer of Martin Luther King. The U. S. Bureau of Prisons interpreted its regulation so as to include authors along with the press and other news media in the group which are prohibited from face-to-face interviews with Federal inmates. Noting

that the purpose of the interview was to elicit information of the ideas and experiences of a third person bearing upon a tragic political event of the 1960's, the Court found the Federal prison prohibition against face-to-face interviews unconstitutional and ordered that the interview requested be held, subject only to reasonable provisions as to time and place. In such a situation, it is highly unlikely that the inmate in question would have requested an interview even though he possesses information of relevance and importance to the public at large. Indeed, it is highly unlikely that the inmate in question would have even known of the existence of the author-Plaintiff in *McMillan* had not McMillan instituted the request in the first instance.

The facts of the *McMillan* case demonstrate that ideas and information in the possession of inmates which the inmates would willingly consent to divulge to the press, and hence to the public, are unlikely to be so divulged unless the press itself is given the right to initiate requests for interviews.

Since prisoners are not likely to effectively exercise their First Amendment rights to seek and have interviews with the press, whether it be due to lack of education, ignorance of such rights, insufficient knowledge about which members of the press should be contacted for interview purposes or lack of initial motivation to initiate the interview process, prisoners' First Amendment rights are not likely to be exercised to the fullest extent envisoned by the Founding Fathers and the many cases interpreting the First Amendment unless the press be accorded an equal right to seek and obtain interviews with consenting inmates. The First Amendment rights of prisoners, the press and the public have been recognized to be truly inseparable when the starting point is the right of the prisoner to be heard.

Nolan v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) at 547-548; *Guajardo* v. *Beto*, 349 F.Supp. 211 (S.D.Tex. 1972).

Accordingly, even if the press had no independent First Amendment right to engage in news gathering through the means of face-to-face interviews with consenting prison inmates, nevertheless this Court should hold that the First Amendment requires a recognition of that right for the purpose of fullest vindication of the prisoners' right to be interviewed by the press which has been upheld and sustained by the Court below.

CONCLUSION

An absolute ban on press interviews with consenting inmates violates the First Amendment rights of the press to engage in all those activities necessary to printing and publishing. Such a ban constitutes a prior restraint of expression.

No satisfactory alternative to personal interviews exists and the ban, therefore, constitutes a significant constriction of the flow of news to the public. The ban is not limited to particular institutions, inmates, situations or other conditions which might possibly justify limitation on personal interviews between inmates and the press. No compelling state interest has been shown for its overbroad restriction on First Amendment rights. The Court below has in effect found that there is no such compelling interest on the facts of this case. Finally, prohibiting newsmen from initiating interviews with consenting inmates results in a dilution of the exercise of the First Amendment right to speak and be heard which the Court below has recognized on the part of prisoners. If for no other reason than this, the press should be allowed to initiate and seek out interviews with consenting inmates.

For reasons stated above, the Houston Chronicle Publishing Company as *amicus curiae* suggests that this Court should hold the California regulation banning interviews by the press with specific consenting inmates to be in violation of the First Amendment to the United States Constitution, should reverse their judgment of the Court below dismissing the media-Plaintiff's complaint and should hold that press interviews with consenting inmates can only be prohibited where it is the judgment of the prison administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems.

Respectfully submitted,

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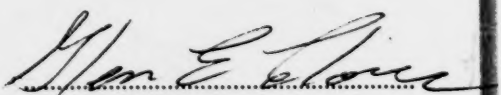
CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of March, 1974, two copies of the Brief of Houston Chronicle Publishing Company, *Amicus Curiae,* were mailed, postage prepaid, certified mail, return receipt requested, to John T. Murphy, Deputy Attorney General, State of California, State Building San Francisco, California 94102, Counsel for the Appellees and Herman Schwartz and Edward I. Koren, National Prison Project of the American Civil Liberties Foundation, 525 O'brian Hall, North Campus, State University of New York at Buffalo, Amherst, New York 14260, counsel for Appellants. I further certify that all parties required to be served have been served.



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